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Compliance Elites

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COMPLIANCE ELITES

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As corporate compliance has expanded its influence, so too has the status of those who implement and oversee the firm's compliance function. Chief compliance officers (CCOs), who are often (but not exclusively) lawyers by training, increasingly boast the types of resumes one associates with elite lawyers. In many ways, this is good news for compliance. There may, however, be several downsides to a strategy of relying so heavily on a cadre of compliance elites. The aim of this Article is to discuss one of these downsides.

High-performing lawyers nurture a potent, yet underexplored, cognitive blind spot. Having performed extremely well under exacting and hierarchical performance regimes earlier in their lives, these perpetual "winners" may be less adept in identifying performance metrics that are unduly severe or prone to induce cheating. Similarly, elite lawyers may be more likely to discount, ex post, the red flags that arise when an employee or organizational unit's performance is just too good to be true. As compliance matures, the challenge for its top personnel will be to recognize and address these blind spots and hopefully learn from them.

This Article sets three goals: first, to highlight the emergence of a cadre of elite lawyers within the compliance industry; second, to explore and synthesize the positive aspects of this development; and third, to hypothesize and draw attention to the drawbacks of focusing one's hiring on the compliance officer's elite resume. The takeaway is not that firms should eschew the advice of elite lawyers in compliance matters. Rather, it is to pose the suggestion that top performers may not always be best at detecting the misconduct risk generated by systems designed to measure and reward workplace performance.

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INTRODUCTION

In mid-August 2019, Carnival Corporation, the well-known cruise operator whose environmental violations extend at least as far back as the 1990s, announced with great fanfare the appointment of its inaugural chief ethics and compliance officer.[1] Peter Anderson, a former prosecutor with twenty years' relevant experience and a background in environmental compliance, vowed to build a world-class compliance program and improve Carnival's reputation and internal culture.[2] The company further announced that Anderson would become a member of the company's leadership team and report directly to its chief executive officer (CEO), along with "dotted-line reporting" to the company's board of directors.[3]

For those who study compliance, Anderson's hiring represents a positive development, notwithstanding the series of scandals that preceded it.[4] It underscores the claim that publicly held companies can no longer openly write off criminal liability as a mere cost of doing business. Compliance has become an essential component of corporate governance.[5] To repair systems and prevent future ethical and legal failures, firms have either added the word "compliance" to the chief legal officer's title or have created separate chief compliance officer (CCO) positions to coordinate, grow, and promote the firm's compliance function.[6]

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1. Jaclyn Jaeger, *Still Under Probation, Carnival Names Chief Ethics and Compliance Officer*, COMPLIANCE WK. (Aug. 12, 2019, 5:01 PM), https://www.complianceweek.com/grapevine/still-under-probation-carnival-names-chief-ethics-and-compliance-officer/27559.article [https://perma.cc/2VNG-TS9L].

2. *Id.* For further detail on Carnival's misconduct, which culminated in a $20 million fine for several violations while the company was completing its probation, see Merrit Kennedy & Greg Allen, *Carnival Cruise Lines Hit with 20 Million Penalty for Environmental Crimes*, NPR (June 4, 2019, 2:22 PM), https://www.npr.org/2019/06/04/729622653/carnival-cruise-lines-hit-with-20-million-penalty-for-environmental-crimes [https://perma.cc/DJ88-H3MD].

3. Sue Reisinger, *Carnival Names Ex-environmental Prosecutor Peter Anderson to Chief Compliance Job*, LAW.COM (Aug. 12, 2019, 12:44 PM), https://www.law.com/corpcounsel/2019/08/12/carnival-names-ex-environmental-prosecutor-peter-anderson-to-chief-compliance-job/ [https://perma.cc/59X4-T5SF]. The term, "dotted-line reporting" ordinarily describes an informal, looser reporting relationship between the CCO and the company's board of directors, whereby the CCO can relay information of importance directly to the board, rather than going through the CEO or general counsel. *See, e.g.*, Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WIS. L. REV. 495, 500.

4. Kishanthi Parella pithily summarizes this temporal dynamic: "change follows scandal." Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. 907, 916 (2018).

5. *See generally* Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075 (2016) (analyzing the symbiotic relationship between compliance and corporate governance).

6. Although lawyers have long advised clients on how best to behave within the bounds of the law, it is a more recent phenomenon whereby the multiple tasks we associate with the word "compliance" have melded into a singular, essential corporate "function." *See generally* Geoffrey Parsons Miller, *The Compliance Function: An Overview*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 981 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

The titles of these programs vary. Sometimes, for example, they include the word "ethics," resulting in the odd acronym CECO.[7] In many other instances, the CCO's ethics oversight is presumed. Aside from titles, the substance and structure of these programs also vary. The compliance department may overlap with, or be coterminous with, the corporation's legal department—particularly when the corporation is privately held and small.[8] In other instances—often, in large publicly held corporations—it operates as a separate, stand-alone entity.[9] In the latter case, the department's personnel, despite their legal degrees, report to an officer other than the firm's chief legal counsel. Regardless of their form, compliance departments have become prevalent, if not ubiquitous, across many industries,[10] with their titular heads reporting to the firm's highest levels of management.[11]

With responsibility comes power, or at least a colorable demand for a high-paying salary. Today's top compliance officers—many of whom are, or once were, practicing lawyers—command notably high salaries and possess the types of resumes and past experience one commonly associates with the highest echelons of the legal profession.[12] For example, Anderson arrived at

7. Michelle DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71, 73–76 (2014).

8. José A. Tabuena, *The Chief Compliance Officer vs the General Counsel: Friend or Foe?*, COMPLIANCE & ETHICS MAG., Dec. 2006, at 4, 4 (observing that "there are still a fair number of companies where the [general counsel] also serves as the compliance officer").

9. For arguments that the structure debate has led to a siloed approach to compliance that underemphasizes the importance of information flows between employees and managers, see Nicola Faith Sharpe, *Prioritizing Process: Empowering the Corporate Ethics and Compliance Function*, 2019 U. ILL. L. REV. 1321, 1323 (arguing that those with a structuralist orientation "pay comparatively little attention to how information flows to the [compliance] managers holding those positions or how those managers use that information once they receive it"). *See also* J. S. Nelson, *Disclosure-Driven Crime*, 52 U.C. DAVIS L. REV. 1487, 1559–62 (2019).

10. Joseph E. Murphy, *Policies in Conflict: Undermining Corporate Self-Policing*, 69 RUTGERS U. L. REV. 421, 423 (2017) ("It is now routinely accepted that companies should have [compliance] programs to prevent and detect various forms of misconduct."); *see also* James A. Fanto, *Surveillant and Counselor: A Reorientation in Compliance for Broker-Dealers*, 2014 BYU L. REV. 1121, 1123 (observing compliance's growth in the financial industry, where compliance "is now well established and accepted in financial firms"). *See generally* GEOFFREY MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE (2d ed. 2017) (representing the first compliance-oriented casebook released for adoption in law schools); Griffith, *supra* note 5 (describing the growth and importance of corporate compliance generally).

11. "[T]he corporate executives in charge of these small compliance armies have claimed greater attention from the board, rising to top management ranks." Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2146 (2019) (citing authorities tracing the compliance organization's increase in importance and attention). Despite compliance's enhanced "profile," it has not induced most corporate boards themselves to denominate a specific committee to oversee compliance. *See* John Armour et al., *Board Compliance*, 104 MINN. L. REV. 1191, 1200 (2020) (finding that "less than 5 percent of U.S. public companies have established a separate Compliance Committee").

12. As noted prominently in one of the articles reporting Anderson's appointment, Anderson "obtained his law degree from the University of Virginia School of Law in 1991. He served as a trial attorney in the environmental crimes section at the Department of Justice until 1994, when he was named Assistant U.S. Attorney in Charlotte, North Carolina." Reisinger, *supra* note 3. On the profusion of lawyers generally within the compliance sector,

Carnival having already served in the Department of Justice's Environmental Crimes Section and United States Attorney's Office in Charlotte, North Carolina.[13] Many CCOs at similarly high-profile corporations boast equally impressive achievements.[14]

In sum, today's top CCOs increasingly hail from a legal, business, and educational elite. If they are lawyers (and many of them are), they can say that they attended top law schools, worked as associates and perhaps partners at prestigious law firms, and served stints in government agencies such as the Securities and Exchange Commission.[15] Their annual compensation reflects this expertise, presenting attractive and potentially lucrative opportunities for ambitious midcareer and senior attorneys.[16]

There exist many good reasons to be heartened by this trend. Just as they have transformed the firm's in-house legal function, elite lawyers promise to imbue the firm's corporate compliance function with a valuable mixture of skills, prestige, and gravitas.[17] Moreover, elite CCOs can attract talented junior attorneys to their ranks and to the compliance industry overall, thereby strengthening the field.

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see Jennifer M. Pacella, *The Regulation of Lawyers in Compliance*, 95 WASH. L. REV. (forthcoming 2020) (manuscript at 3, 7–12), https://ssrn.com/abstract=3430093 [https://perma.cc/QUW5-SRVJ] (citing studies documenting an increase in the number of current or former lawyers who work "as compliance officers or as part of a compliance team" and explaining the reasons for the increase of lawyers doing compliance work).

13. Jaeger, *supra* note 1.

14. *See infra* Part I.D.

15. Fanto, *supra* note 10, at 1123 (observing that a financial CCO "may often have spent part of his or her career with the Securities and Exchange Commission ('SEC') or the Financial Industry Regulatory Authority ('FINRA')"). The movement between government enforcement positions and corporate compliance departments is reflective of a broader "revolving door" phenomenon whereby attorneys routinely move back and forth between government enforcement agencies, such as the SEC or Department of Justice (DOJ), and private sector jobs with law firms or corporations. For a helpful overview of the phenomenon and the normative debate it has generated, see James D. Cox & Randall S. Thomas, *Revolving Elites: The Unexplored Risk of Capturing the SEC*, 107 GEO. L.J. 845, 849–53 (2019).

16. For more on salary information, see discussion *infra* Part I.C. Readers will note that this discussion focuses exclusively on CCOs and high-level compliance personnel. Although a number of attorneys who now occupy CCO positions worked previously in lower-level compliance positions, many compliance "superstars" appear to have attained their initial experience as associates in prestigious law firms ("Big Law") and as prosecutors and enforcement attorneys within high-profile federal agencies.

17. "Since the 1970's, the [chief legal officer] has enjoyed substantial stature and responsibility within the firm, commensurate with the perceived value of corporate counsel and the legal function by senior executives." Robert C. Bird & Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 AM. BUS. L.J. 203, 209 (2016). A rich literature explores the evolving roles of in-house counsel and business lawyers generally. *See generally* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984); Geoffrey Miller, *From Club to Market: The Evolving Role of Business Lawyers*, 74 FORDHAM L. REV. 1105 (2005) (exploring changes in the market for legal services and its effect on the major accounting frauds that occurred at the end of the 1990s and early 2000s); Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457 (2000) (focusing on in-house attorneys); Eli Wald, *In-House Myths*, 2012 WIS. L. REV. 407 (exploring and exploding a number of the stronger myths that revolve around contemporary in-house legal practice).

Before proceeding further, it is important to define the terms "elite" and "compliance." As used in this context, the term "elite" refers to an attorney's academic and postgraduate achievements: her education, her awards while in law school, her clerkship, and the various positions she held after law school.[18] Elitism is admittedly enmeshed with contestable presumptions about meritocracy,[19] but it functions as a useful proxy for, among other things, the compliance officer's market power.

"Compliance" is a term of art that has come to describe the core coordination function responsible for a number of monitoring and oversight tasks within the firm. These include: explaining and translating laws; identifying risks; analyzing failures and remediating weaknesses; and finally, investigating reports of wrongdoing and advising the company's top decision makers on next steps.[20] Some of these tasks will be taken up by in-house lawyers within the general counsel's direct jurisdiction and some by members of the compliance department who also happen to be lawyers. Others will be handled by attorneys and legal consultants who work outside the firm. It is beyond argument, however, that individuals who hold legal degrees (and were therefore trained in law schools and other legal settings) will, in some form or another, oversee or engage in a good portion of the firm's compliance-related work.

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18. This discussion incorporates a "human capital" theory of elitism, whereby an attorney's elite credentials reflect some mix of expertise, skills training, and ability. *See, e.g.*, Cox & Thomas, *supra* note 15, at 856 (citing authorities). None of this is to deny that these "objective" achievements may be partially the product of racial and socioeconomic privilege. *See, e.g.*, Kevin Woodson, *Human Capital Discrimination, Law Firm Inequality, and the Limits of Title VII*, 38 CARDOZO L. REV. 183, 185 (2016) (citing "disparate access to high-quality work opportunities" among black junior law firm associates); *see also* David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1608 (1998) (arguing that elite law firms do not host level playing fields for associates seeking partnership).

19. "A meritocratic worldview endorses the belief that anyone, regardless of their social location, is free to be successful through their own merits. Under this logic, individual outcomes are fair and deserved because they are the result of . . . individual talent and effort." Leisy Abrego, *Legitimacy, Social Identity, and the Mobilization of Law: The Effects of Assembly Bill 540 on Undocumented Students in California*, 33 LAW & SOC'Y INQUIRY 709, 711–12 (2008) (citations omitted) (describing the meritocratic worldview that has become "deeply rooted" in American culture). For a recent critique of meritocracy's assumptions and normative implications, see generally DANIEL MARKOVITS, THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE (2019).

20. *See, e.g.*, Miriam H. Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 958 (2009) (defining compliance as "a system of policies and controls that organizations adopt to deter violations of law and to assure external authorities" that they are doing so); Fanto, *supra* note 10, at 1143–48; Miller, *supra* note 6, at 981 (describing the function as one which "consists of efforts organizations undertake to ensure that employees and others associated with the firm do not violate applicable rules, regulations, or norms"). As Pacella points out, many of these tasks are well suited for someone with legal training. Pacella, *supra* note 12 (manuscript at 10).

Scholars have already highlighted the drawbacks of placing the company's general counsel directly in charge of the compliance function.[21] They have also theorized the reasons why in-house corporate lawyers have been unsuccessful in preventing corporate malfeasance.[22] This Article's modest goal is to chart a phenomenon few would conceptualize as a problem at all: the emergence of a compliance elite. Elite compliance officers—particularly those with the strongest and most impressive legal backgrounds—may be prone to a weakness that I refer to here as a *performance blind spot*. This concept self-consciously draws on the now famous *ethical blind spots* that business ethicists Max Bazerman and Ann Tenbrunsel articulated in their foundational work on organizational wrongdoing.[23]

The ethical blind spot literature powerfully demonstrates a divergence between ethical behavior and ethical perception.[24] Particularly when people are acting under time pressure or in the moment, their "blind spots" prevent them from recognizing the moral and ethical implications of their behavior.[25] Ethical blind spots permit individuals to view themselves as upstanding citizens, even as they gradually "engage in ethically questionable behavior that contradicts their own preferred ethics."[26] The persistence of these blind spots explains not only how otherwise "good" individuals manage to delude

21. The concern is usually voiced as one of conflicting alliances: "Legal writers have puzzled over the professional responsibilities of compliance officers who are also in-house lawyers, thus bound by their duties to the corporate client." Gadinis & Miazad, *supra* note 11, at 2149–50; Langevoort, *supra* note 3, at 500 (citing the "robust debate" as to whether the in-house legal department should be "walled off" from the compliance function); Pacella, *supra* note 12 (manuscript at 36–37) (describing the conflicting allegiances the general counsel and compliance officer hold).

22. The *Fordham Law Review*'s December 2005 symposium issue is particularly on point. *See* Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983 (2005); Manuel A. Utset, *A Model of Time-Inconsistent Conduct: The Case of Lawyer Misconduct*, 74 FORDHAM L. REV. 1319 (2005); *see also* Jill Fisch & Kenneth Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097 (2003).

23. MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT (2011). Tenbrunsel has published numerous articles on ethical weaknesses with additional coauthors. *See, e.g.*, Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 227–28 (2004); Ann Tenbrunsel & Kristin Smith-Crowe, *Ethical Decision-Making: Where We've Been and Where We're Going*, 2 ACAD. MGMT. ANNALS 545 (2008).

24. *See* BAZERMAN & TENBRUNSEL, *supra* note 23, at 43 (stating that the "core aspect" of a concept known as "bounded ethicality" is that "people often act unethically without their own awareness"). According to Yuval Feldman, this literature helps us see "the gap between how ethical we think we are and how ethical we actually are." YUVAL FELDMAN, THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR 38 (2018). Feldman, whose recent book comprehensively surveys all of the recent research in this area, dubs this discipline the study of "behavioral ethics." *See id.* at 2–3 (distinguishing behavioral law and economics, which studies gaps in rationality, from behavioral ethics, which "addresses people's inability to fully recognize the ethical, moral and legal aspects of their behavior").

25. BAZERMAN & TENBRUNSEL, *supra* note 23, at 66–72.

26. *Id.* at 5.

themselves into engaging in wrongdoing but also why conventional exhortations to follow the rules may fall short within corporate settings.[27]

All employees are—to some degree or another—prone to ethical blind spots and bounded ethicality. The aim of this Article, however, is to suggest that the elite compliance officer wears an additional set of blinkers, which blinds her to emerging misconduct within the firm. These additional blind spots, I argue, are bound up with the tricky question of how the firm goes about judging and rewarding its employees' performance.[28] Measuring and compensating performance has long been understood to play a foundational role in fueling corporate misconduct; employees violate laws in order to preserve their jobs or get ahead.[29] As I argue here, if corporate employees slide into illegal behavior because of their *ethical* blind spots, their elite overseers may be just as badly hobbled by their own *performance* blind spots.

Consider an admittedly oversimplified narrative of how for-profit firms commonly reward their employees (or at least claim they do). Supervisors reward lower-level employees for their industry and initiative, often referred to as "productivity."[30] Employees who perform above the mean receive bonuses and promotions; those who fall below perhaps receive warnings, reductions in salary, and forced buyouts. Compensation, promotion, and even just the preservation of one's job are all said to hinge on one's performance.[31]

From an economist's perspective, there is nothing wrong with incentivizing or rewarding performance. Performance affords the firm a far superior methodology for doling out rewards than social status, race, or gender (not to mention personal corruption).[32] Measurement nevertheless

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27. *Cf.* FELDMAN, *supra* note 24, at 11 (arguing that we currently "lack sufficient knowledge about individuals' awareness of the ethicality of their behavior and their ability to control" their ethical blind spots). Feldman later urges policymakers to revisit "many of the existing behavioral models of legal regulation and enforcement, which for the most part have relied on the assumption of deliberateness and rationality." *Id.* at 14.

28. Much of the corporate management literature focuses on how managers motivate, measure, and compensate employee performance. *See, e.g.*, Martin Petrin, *Corporate Management in the Age of AI*, 2019 COLUM. BUS. L. REV. 965, 978 (describing managerial work and managers' influence over corporate workforces).

29. *See, e.g.*, John Armour et al., *Taking Compliance Seriously*, 37 YALE J. ON REG. 1, 18 (2020) (discussing the compliance implications of poorly designed performance targets); *see also* discussion *infra* Part II.A.

30. The managerial performance literature overlaps the study of industrial organizations and workplace bureaucracy. For more on the latter and the profusion of "branching hierarchies" within large, publicly held corporations that internalize and implement the firm's performance objectives, see Stephen M. Bainbridge, *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 DEL. J. CORP. L. 979, 1009 (1998) (describing hierarchies throughout publicly held corporations, through which higher- and mid-level managers direct and monitor workplace performance).

31. "[E]xceptional managerial service may find its reward in a better reputation or in job offers from other firms, just as poor performance can jeopardize tenure by triggering termination . . . ." Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 863 (1984).

32. It is of course true that so-called objective performance factors can instead mask bias. *See, e.g.*, Woodson, *supra* note 18, at 186. Not all performance hinges on a supervisor's subjective assessment. Companies increasingly rely on "data analytics" to judge the

can instigate unethical, and potentially illegal, behavior. One need only glance at highly touted workplace surveys to confirm this unfortunate fact.[33] Scholars have long recognized that distortions and outright cheating arise in response to disappointing results.[34] Missed targets, in turn, incite rational fears of termination and demotion. Cheating, moreover, carries viral qualities; misconduct in one unit can spread quickly to others, and cheating in one company can induce cheating among one's competitors.[35] Accordingly, when misused or misunderstood, performance metrics can fuel costly and perverse behavior, the very types of behavior the compliance function seeks to identify, prevent, and remediate.[36]

This in turn creates an interesting dilemma for elite lawyers because they, for much of their adult lives, have landed on the right side of the performance curve. They achieved high grades throughout their academic careers. They fared well on standardized tests such as the LSAT. They attained various honors in law school, where many exams are graded on a curve.[37] And they took and passed their state's bar exam, a test that mercilessly excludes from the legal profession those whose scores fall below a set floor.[38]

The foregoing recitation does not even begin to describe the elite lawyer's legal career by the time she reaches the position of CCO.[39] If she boasts the

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performance of their workers. *See* Matthew T. Bodie, *Workplace Freakonomics*, 14 I/S: J.L. & POL'Y FOR INFO. SOC'Y 37, 42 (2017) (explaining how firms have come to employ data to better analyze employee performance).

33. *See generally* INTERPERSONAL MISCONDUCT IN THE WORKPLACE: WHAT IT IS, HOW IT OCCURS AND WHAT YOU SHOULD DO ABOUT IT, ETHICS & COMPLIANCE INITIATIVE (2018), https://www.ethics.org/download-the-2018-global-business-ethics-survey/ [https://perma.cc/6KZD-F9ST]; PWC, PULLING FRAUD OUT OF THE SHADOWS: GLOBAL ECONOMIC CRIME AND FRAUD SURVEY (2018), https://www.pwc.com/gx/en/forensics/global-economic-crime-and-fraud-survey-2018.pdf [https://perma.cc/MX52-AN69].

34. *See* Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 693 (articulating the famous theory that securities fraud "usually occurs when agents fear themselves to be in their last period of employment"). Arlen and Carney's "last-period hypothesis" assumed that *the firm* was ailing and therefore placed the high-level employee in his "last period" of employment. *Id.* at 702–03.

35. *See* Todd Haugh, *The Power Few of Compliance*, 53 GA. L. REV. 129, 166–70 (2018) (employing network theory to explain how lawbreaking spreads throughout organizations); *see also* Christina Parajon Skinner, *Misconduct Risk*, 84 FORDHAM L. REV. 1559, 1576–82 (2016) (exploring the ways in which misconduct in one institution spreads to others within the same industry, thereby undermining a system).

36. Armour et al., *supra* note 29, at 19.

37. "[A] top law school adds the final link in a long chain of rigorous schooling. Students at elite professional schools overwhelmingly earned their A grades at highly selective colleges . . . ." MARKOVITS, *supra* note 19, at 7 (explaining that law school represents the culmination of the student's participation in a series of "multistage meritocratic tournaments").

38. For the purposes of this discussion, I assume this performance was authentic. Compliance attorneys who cheated on the bar or plagiarized papers in college or law school would, of course, present a host of *different* risks to firms who sought their services.

39. *See, e.g.*, Gabe Friedman, *GM Promotes Deputy GC to Chief Compliance Officer*, BLOOMBERG L. (Apr. 27, 2016), https://biglawbusiness.com/gm-promotes-deputy-gc-to-chief-compliance-officer [https://perma.cc/H259-EBFX] (describing Jeffrey Taylor's background before advancing to General Motors's CCO position, which included stints in the

type of resume that many high-profile CCOs now have, she likely has entered and won multiple workplace contests, coming out on top of an increasingly rarefied group of fellow attorneys and professionals.[40] In sum, the typical elite lawyer who attains the position of a Fortune 500 CCO is, beyond all, a good *performer*, and oddly enough, this may create difficulties in how she evaluates and protects the firm's performance systems.

Performance blind spots pose interesting challenges for the field of corporate compliance. Writ large, they undermine the compliance function's mission. On a more retail level, they elucidate how a good faith effort to pump up one's compliance program—by, for example, hiring a top attorney with a fancy resume—may end in regrettable failure. Concededly, compliance elites may be able to mediate their biases, but they need to know they exist in the first place.

The remainder of this piece unfolds as follows: Part I highlights the emergence of an elite cadre of compliance professionals. Part II synthesizes elitism's benefits to compliance. Part III constructs the theory of the performance blind spot and hypothesizes its contribution to *non*compliance. Part IV briefly highlights developments in compliance from which one might draw useful prescriptions.

I. THE EMERGENCE OF A COMPLIANCE ELITE

A. The Billion-Dollar Industry

It is hardly news to anyone in the corporate world that compliance is a billion-dollar business. Although reports vary (in part because the relevant industry varies), the global "enterprise, governance, risk and compliance" market has been forecasted to exceed $50 billion within the next five years.[41] In 2018, William Laufer cited an impending "milestone" whereby the number of corporate audit, legal, and compliance-related employees would eventually match (and presumably exceed) the number of police officers in the United States.[42] Major firms, most notably financial institutions,

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Department of Justice, as U.S. Attorney for the District of Columbia, and as Raytheon's general counsel).

40. Some of these contests may be properly described as tournaments. A tournament system promotes a fixed percentage of employees and exchanges a portion of current compensation for future compensation. Wilkins & Gulati, *supra* note 18, at 1583 (explaining the basic theory).

41. *Enterprise Governance, Risk & Compliance Market Worth $88.48 Billion by 2027*, GRAND VIEW RES. (Feb. 2020), https://www.grandviewresearch.com/press-release/global-enterprise-governance-risk-compliance-egrc-market [https://perma.cc/QLJ7-5A9T] (forecasting a market in excess of $80 billion by 2027); *Global Governance, Risk and Compliance Platform Market Report 2019: Market Was Worth US$ 24.9 Billion in 2018 and Is Expected to Reach $47.1 Billion by 2024*, PR NEWSWIRE: CISION (Mar. 25, 2019, 7:15 PM), https://www.prnewswire.com/news-releases/global-governance-risk-and-compliance-platform-market-report-2019-market-was-worth-us-24-9-billion-in-2018-and-is-expected-to-reach-47-1-billion-by-2024--300817601.html [https://perma.cc/JX8K-L2E7] (forecasting a market worth more than $47 billion by 2024).

42. William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PA. J. BUS. L. 392, 393 (2018). Laufer came up with the figure by combining the Bureau of Labor's estimates of the

routinely spend in the tens, if not hundreds, of millions of dollars or more in this area and seem poised to continue to do so.[43] Compliance has thus become a lucrative source of income for attorneys, white shoe or "Big Law" firms, and alternative legal services providers such as KPMG and PricewaterhouseCoopers.[44]

Because compliance intersects heavily with law, the legal education market has long positioned itself as a feeder and credentialing service for businesses seeking compliance expertise.[45] Law schools routinely advertise programs and certificates in compliance and risk management.[46] Geoffrey Miller has published a legal casebook[47] on corporate compliance and currently acts as the lead reporter for the American Law Institute's Principles of Corporate Compliance and Risk Management.[48] At the same time, business schools hire legal scholars to study and teach compliance and ethics-related topics.[49]

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number of compliance officers employed in 2016 (273,000) plus a "modest percentage" of professionals across the "FinTech and RegTech ecosystem." *Id.* at 393 n.1.

43. *Id.* at 394.

44. *See generally* Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221 (2011). On the rise of alternative legal service providers and the "Big Four" accounting firms (all of whom supply compliance-related consulting), see RANDALL KISER, AMERICAN LAW FIRMS IN TRANSITION: TRENDS, THREATS, AND STRATEGIES 28–30 (2019).

45. As Pacella observes, law schools intensified their emphasis on compliance in the wake of the 2008 recession and contraction in the traditional legal market. *See* Pacella, *supra* note 12 (manuscript at 8–12).

46. According to the American Bar Association's website, at least seventeen law schools of varying ranks offer either an LLM, certificate, or similar degree in ethics and risk management or corporate, financial, or health-care compliance. *LL.M. and Post-J.D. Degrees by School*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_school/ [https://perma.cc/QSB6-L2RB] (last visited Mar. 17, 2020).

47. *See generally* MILLER, *supra* note 10.

48. *See Principles of the Law, Compliance, Risk Management and Enforcement*, AM. L. INST., https://www.ali.org/projects/show/compliance-enforcement-and-risk-management-corporations-nonprofits-and-other-organizations/#_participants [https://perma.cc/9T3X-95EP] (last visited Mar. 17, 2020). Jennifer Arlen, James Fanto, and Claire Hill are coreporters on this multiyear project. *Id.*

49. The author is a senior fellow of the Carol and Lawrence Zicklin Center for Business Ethics Research at Wharton. *People*, U. PA.: WHARTON, https://live-wharton-zicklincenter.pantheonsite.io/people [https://perma.cc/2LUM-CGK4] (last visited Mar. 17, 2020). Other schools feature departments and programs in business law and ethics. For example, Indiana University at Bloomington's Kelley School of Business promotes a Department of Business Law and Ethics and the University of Michigan's Ross School of Business recently announced a major gift to be used to create a new Business Ethics and Communication Center. *See $5 Million Gift Will Establish New Business Ethics and Communications Program at Michigan Ross*, U. MICH. ROSS SCH. BUS., https://michiganross.umich.edu/ross-news-blog/2019/06/20/5-million-gift-will-establish-new-business-ethics-and-communications [https://perma.cc/8ZQH-X2TE] (last visited Mar. 17, 2020); *Business Law & Ethics at Kelley School of Business*, IND. U. BLOOMINGTON, https://kelley.iu.edu/faculty-research/departments/business-law-ethics/index.cshtml [https://perma.cc/5DXY-E7UQ] (last visited Mar. 17, 2020).

Much of this growth is attributable to a series of doctrinal rules[50] and institutional policies[51] that either require or strongly encourage firms to implement internal monitoring and control systems. As the industry matures, however, some of the growth within individual firms can be traced to the various for-profit businesses who pitch compliance services and products.[52] Familiar narratives of following the herd and conflating size for effectiveness lead firms to overinvest in compliance expenditures, even as they remain uncertain of their respective programs' overall effectiveness.[53]

B. The Argument(s) for Compliance

Numerous legal regimes encourage or effectively require for-profit firms to implement compliance programs. One need not describe all of these programs here; the most cited include the Department of Justice's Principles of Federal Prosecution, the United States Sentencing Guidelines provisions for organizational offenders, and more recently, guidance issued by foreign enforcers, such as the United Kingdom's Serious Fraud Office.[54] Each of these regimes partially judges a corporate offender's behavior through the lens of its compliance program. "Good" firms nurture and grow their compliance departments; "bad" ones starve the function altogether or engage in elaborate window dressing.

Over the past decade, the Department of Justice has issued written, nonbinding guidance documents to aid prosecutors (and indirectly, corporate directors) in executing their compliance oversight obligations.[55] These documents, although written in the vague, high-level language of regulatory-speak, shed some light on the department's thought process.[56] Overall, its

50. *See generally* Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013 (2019) (tracing the emergence of Delaware's oversight doctrine).

51. *See generally* Baer, *supra* note 20 (analyzing compliance's relationship with the Department of Justice's internal charging guidance for prosecutors, which also promises leniency to firms that adopt effective compliance programs); Laufer, *supra* note 42 (connecting the rise of compliance to the Organizational Sentencing Guidelines put in place in 2001, which reduced a corporate offender's punishment in cases where the entity demonstrated an "effective compliance program"). A number of regulatory agencies separately encourage firms to maintain compliance programs. Armour et al., *supra* note 29, at 2.

52. Presumably, not all of this "help" is valuable. *See* Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 933 (2017) (observing that "[c]onsultants and vendors advocate a seductive (and often expensive) set of ideas, products and services . . . in the name of self-protection, abetted by in-house compliance personnel who covet the additional resources and status that come from increased company investments . . . .").

53. Laufer, *supra* note 42, at 407; *see also* Armour et al., *supra* note 29, at 15 (advising that "relatively little is known about the structure and efficacy of corporate compliance").

54. JUSTICE MANUAL § 9-28.000 (U.S. DEP'T OF JUSTICE 2018); U.S. SENTENCING GUIDELINES MANUAL ch. 8 (U.S. SENTENCING COMM'N 2018); *Deferred Prosecution Agreements*, U.K. SERIOUS FRAUD OFF., https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ [https://perma.cc/5D6L-WRMZ] (last visited Mar. 17, 2020).

55. JUSTICE MANUAL § 9-28.100.

56. Laufer's criticism of the government's guidance on compliance is particularly scathing: "Regulators tease the regulated with rudimentary prescriptions for diligence that

prosecutors prefer programs that are well resourced and deliberately designed, that employ qualified compliance personnel, and that enable employees to communicate compliance concerns effectively and without fear of retaliation.[57]

If a company can establish its compliance program's efficacy, it can avoid a criminal prosecution altogether or at least secure an agreement with prosecutors that requires fewer interventions in its operations and corporate governance.[58] Compliance pays for itself when it substantially reduces the company's exposure to harsher punishment outcomes.[59] This is most likely to be the case when the company's compliance program voluntarily discloses wrongdoing that was previously unknown to government authorities.[60]

Although there exist many good reasons to erect a sophisticated compliance department, countervailing forces threaten to weaken it. First, compliance costs money, both in terms of head count and systems.[61] Second, compliance is often thought to reduce flexibility in corporate planning and interfere with spontaneous decision-making.[62] Third, insofar as the

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appear to be literally ripped from the pages of introductory management textbooks and business airport books." Laufer, *supra* note 42, at 405.

57. In the spring of 2019, the Department of Justice's Criminal Division released an additional nonbinding manual that poses a series of open-ended questions designed to aid prosecutors *and* corporate compliance officers in evaluating compliance programs. Press Release, U.S. Dep't of Justice, Criminal Division Announces Publication of Guidance on Evaluating Corporate Compliance Programs (Apr. 30, 2019), https://www.justice.gov/opa/pr/criminal-division-announces-publication-guidance-evaluating-corporate-compliance-programs [https://perma.cc/23Z3-2F6X]; *see also* Armour et al., *supra* note 29, at 16–17 (describing the DOJ's compliance manual's major points of emphasis).

58. On the emergence of nonprosecution and deferred prosecution agreements, see generally Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537 (2015) (reporting research of several years' worth of organizational settlements) and see also BRANDON GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 47 (2014) (critiquing negotiations between prosecutors and corporations).

59. This valuable "carrot" is one of the reasons a director's failure to ensure the compliance function's existence constitutes a violation of the fiduciary duty of loyalty. *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (locating the oversight duty within the fiduciary duty of loyalty); *In re* Caremark Int'l Inc., 698 A.2d 959, 970 (Del. Ch. 1996). Although shareholders have brought lawsuits advancing *Caremark*-type claims, these claims infrequently succeed, in part because Delaware's standard sets the compliance bar so low. *See, e.g.*, Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 479–84 (2012) (recounting cases in which *Caremark*-type claims have failed). For a more recent account of how *Caremark* claims have developed into dual duties of oversight and obedience, see Pollman, *supra* note 50, at 2027 (*Caremark* and its progeny "reflect[] an understanding that fidelity to the law is nonnegotiable.").

60. The DOJ has emphasized a potential declination of all charges when the firm voluntarily discloses violations of the Foreign Corrupt Practices Act. *See* Sharon Oded, *Trumping Recidivism: Assessing the FCPA Corporate Enforcement Policy*, 118 COLUM. L. REV. ONLINE 135, 136 (2018).

61. *See* Armour et al., *supra* note 29, at 13 (describing training and head count costs, as well as the "costs of integrating the program into the firm's business structure").

62. *See, e.g.*, Fanto, *supra* note 10, at 1129 (examining how "the increase in compliance burdens on broker-dealers may undermine the flexibility and capacity for innovation that is the hallmark of a beneficial finance").

compliance program incorporates employee discipline, it introduces a measure of distrust among mid-level managers and employees.[63] Fourth, the government's promise of leniency is discretionary and unenforceable; the uncertainty this breeds weakens the corporation's resolve to investigate and report instances of wrongdoing.[64]

A seesaw dynamic thus materializes. Regulators and prosecutors prompt the compliance function's formation and an eager industry evolves to support it. A series of countervailing factors just as strongly undermine the function's effectiveness, leading critics and regulators alike to wonder how seriously corporate management takes its responsibility. After some hand-wringing, government actors and corporate boards respond by doubling down. They order *more* compliance products, hire *more* compliance personnel, and enshrine at the top of this pyramid a CCO whose credentials and background render her a sure bet for steering the company into safer waters. The market for the elite CCO thus arises out of compliance's most notable failures, not its successes.

C. The Structural Debate

Commentators have debated how best to structure the firm's compliance function. Should it be helmed by an attorney or directed by someone with an accounting background?[65] Should "compliance" exist as an independent entity, with direct access to the board, or should it nest within the in-house legal department, reporting up to a general counsel? Scholars have examined these issues at length, often instantiating the debate's context-specific characteristics.[66] Suffice it to say that independent programs come out ahead insofar as they visibly coordinate the firm's compliance activities and promote greater transparency in regard to the firm's overall compliance expenditures.[67] Integrated programs, however, benefit from the presence of a strong general counsel's office and from the professionalism and independent judgment (admittedly aspirational) with which attorneys have been taught to approach their jobs.[68]

The foregoing debate obscures an important point: regardless of how a firm chooses to meet its compliance obligations, it will likely rely on attorneys to carry out its compliance-related tasks if it is a high-profile,

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63. Miriam H. Baer, *Designing Corporate Leniency Programs*, *in* CAMBRIDGE HANDBOOK ON COMPLIANCE (Daniel Sokol & Benjamin van Rooij eds., forthcoming) (manuscript at 10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3555950 [https://perma.cc/W2LB-ELHJ].

64. *Id.* (manuscript at 9–10).

65. As compliance becomes more digital, we might ask whether the compliance officer should boast a background in information technology as well.

66. *See, e.g.*, Bird & Park, *supra* note 17, at 205 (arguing that a corporation's chief legal officer must retain responsibility for communicating ethical values throughout the firm); DeStefano, *supra* note 7, at 76–78.

67. At times, government officials have themselves voiced a preference for stand-alone, independent programs. *See* DeStefano, *supra* note 7, at 107.

68. *Id.* at 159–60.

publicly held corporation.[69] These attorneys may engage this work in their professional capacity or in a more consultative capacity from outside the firm; alternately, they may simply be the firm's "compliance employees" who happen to have legal training. But it is beyond cavil that a noticeable cross section of the compliance industry—including those who have risen to industry's highest rungs—will have been trained in the legal profession and will have emerged from the familiar competitive atmospheres that pervade law schools and legal practice.[70]

D. Paying Top Dollar for Talent

As compliance becomes more prevalent, it also grows in complexity. Global businesses must attend to regulatory and legal challenges in countries other than just the United States and often must take note of the third parties and supply chains with whom the firm interacts.[71] Technology and privacy concerns create different and additional headaches; the firm must internalize laws intended to protect employees and consumers, including laws outside the United States if the company is multinational.[72] Moreover, aggressive compliance efforts can render the firm vulnerable to civil litigation with former employees or clients.[73] Accordingly, firms with particularly complex and ongoing compliance needs must be willing to pay top dollar for managerial talent.

Over the past decade, the Society of Corporate Compliance and Ethics (SCCE), a nonprofit trade organization for compliance professionals, has published a series of benchmark surveys on the compliance industry.[74] The most recent survey, which was performed in 2017, confirms the growth of the CCO's responsibilities and corresponding salary range.[75] At least one-third of survey respondents manage annual compliance budgets of over $1 million; 16 percent report that they manage budgets greater than $2 million.[76] Of those surveyed, 25 percent report 5000 or more employees subject to the compliance function's oversight responsibilities.[77] One-third of those surveyed report that they manage compliance in more than one country.[78]

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69. *Id.* at 73–74.

70. Pacella, *supra* note 12 (manuscript at 11–12).

71. *See, e.g.*, Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 767–69 (2014) (examining the challenges of reducing human rights–related and other violations across global supply chains).

72. Miriam H. Baer, *When the Corporation Investigates Itself*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 308, 322–23 (Jennifer Arlen ed., 2018).

73. *Id.*

74. *See generally* SOC'Y OF CORP. COMPLIANCE & ETHICS, 2017 CROSS INDUSTRY CHIEF COMPLIANCE OFFICER AND STAFF SALARY SURVEYS (2017), https://assets.corporatecompliance.org/Portals/1/PDF/Resources/Surveys/scce-2017-cco-and-staff-salary-survey.pdf?ver=2017-11-16-145255-487 [https://perma.cc/R2KK-S7K6].

75. *Id.* at 9.

76. *Id.* at 8.

77. *Id.* at 9.

78. *Id.* at 11.

The officers surveyed worked for a variety of firms (public, private, and nonprofit) and displayed different degrees of tenure in the compliance profession and their respective firms.[79] Some compliance managers have worked within the compliance profession and have managed their compliance department for many years. Many others, however, are new to their company's compliance department and new to the compliance profession itself.[80] Given the familiar announcements one sees in the wake of various corporate scandals, one would not be surprised if some of these "newbies" are in fact elites who have been recruited from prestigious law firms and federal enforcement agencies.

For at least one cross section of CCOs, annual salaries can be quite high.[81] Total cash compensation (salary plus cash bonus) hovered near $300,000 for firms featuring more than twenty employees in the compliance organization and more than 30,000 employees in the organization overall.[82] CCOs who managed budgets of $2 million or more (16 percent of those who responded to the survey) earned an average of $329,000 in total compensation.[83] At the seventy-fifth percentile for number of compliance employees and compliance budget, total cash compensation rose to nearly $400,000.[84] This amount does not include noncash compensation such as stock awards.

Finally, JD degrees were prevalent across all sectors of CCO employment (at least 33 percent, except for very small firms) and seemed to be more common within firms that employed 30,000 or more employees (43 percent).[85] Compliance staff below the CCO level, but occupying vice president positions, also included JD degrees (32 percent).[86]

The claim here is not that all CCOs are earning enormous sums, or even that they are all attorneys. Rather, it is that there exists a small group of individuals who are earning in excess of $350,000 in annual cash compensation, who run major organizations within exponentially larger firms, and who likely have JD degrees. These individuals, whose talents and past practice are often touted in press releases, have taken the reins of the firm's compliance (and sometimes legal) organization within a wide array of

79. *Id.* (showing an array of years spent managing the compliance department); *id.* at 15 (showing a similar array in regard to years in compliance profession).

80. *Id.* at 11, 15.

81. Roughly one-third of those who responded were CCOs for only a division of the organization, whereas two-thirds were CCOs for the entire organization. *Id.* at 30. Presumably, this affected reports of compensation.

82. *Id.* at 17 (showing the number of employees in compliance groups); *id.* at 18 (showing the number of employees overall).

83. *Id.* at 18.

84. *Id.* at 26.

85. *Id.* at 39.

86. *Id.* at 56.

publicly held Fortune 500 companies, from Cisco[87] to ViacomCBS[88] to General Motors[89] to Walmart.[90] Even if they lack previous experience managing a compliance program, those who occupy these posts are well remunerated, highly regarded, and experienced in multiple areas of sophisticated legal and regulatory practice. They are a compliance dream team and, yet, despite (or perhaps because of) their elite credentials, they may eventually fail.

II. ELITISM'S VIRTUES

The preceding section established that corporate compliance has become a lucrative industry that has begun to attract an elite group of attorneys to its highest positions. In this Part, I tease apart the reasons for hiring an elite actor from outside the firm and placing him or her atop the firm's compliance organization.

A. Human Capital

Elite CCOs lend the firm their unique mixtures of legal acumen, expertise, and work ethic. A firm might decide that it is easier and more reliable to purchase these traits from an outside market rather than grow them from within.[91]

Compliance work is difficult. To implement an effective compliance function, an officer must comprehend, synthesize, and communicate a series of complex, overlapping, and often confusing laws to relevant actors. Moreover, she must adapt that message for the different audiences and stakeholders within the firm. A good CCO must also comprehend the firm's operations, its peculiar governance structure, and its financial reporting and

87. *Executive Biography: Mark Chandler*, CISCO: NETWORK, https://newsroom.cisco.com/execbio-detail?articleId=33227 [https://perma.cc/2ERV-SST4] (last visited Mar. 17, 2020) (outlining the biography of Mark Chandler, Cisco's chief legal and compliance officer, who received his JD from Stanford and BA in economics from Harvard).

88. *Henry Moniz*, LINKEDIN, https://www.linkedin.com/in/henry-moniz-94526017 [https://perma.cc/8PLZ-HJJR] (last visited Mar. 17, 2020) (offering the professional history of Henry Moniz, CCO at ViacomCBS, who graduated from the University of Pennsylvania's law school, served as an Assistant U.S. Attorney in the DOJ's Criminal Division and was a partner at Bingham McCutchen).

89. *Jeffrey Taylor*, LINKEDIN, https://www.linkedin.com/in/jeffrey-taylor-2bb41649 [https://perma.cc/6ULW-WAD7] (last visited Mar. 17, 2020) (detailing Jeffrey Taylor's professional history as CCO for General Motors, U.S. Attorney for the District of Columbia, and a graduate of Harvard Law School); *see also GM Names Jeffrey A. Taylor New Chief Compliance Officer*, NEWSWHEEL (Apr. 27, 2016), https://thenewswheel.com/gm-names-jeffrey-a-taylor-new-chief-compliance-officer/ [https://perma.cc/QZK2-JP5B].

90. Elizabeth Olson, *Walmart Hires Former Prosecutor for Ethics Job*, BLOOMBERG L. (May 22, 2019), https://biglawbusiness.com/walmart-hires-former-federal-prosecutor-for-ethics-job [https://perma.cc/9VKB-AZJ6] (describing David Searle's background, including a federal appeals court clerkship after law school and time as an Assistant U.S. Attorney in Houston and as an associate at Baker Botts).

91. Even if the firm values an insider's knowledge and loyalty, it can reward that insider with a lesser position, such as vice president or director.

extant internal controls. Across the firm, the CCO must develop the informal connections and formal structures sufficient to identify weaknesses and risks inherent in various practices and policies.

If compliance represents a marriage of the firm's "enterprise" risks and its corresponding "legal" risks, the effective CCO's task is to become a mini-expert in both, to immerse herself in her company's "structures," "processes," and overall culture, while keeping a critical eye on the legal and regulatory world that either buffets or cocoons her employer.[92] And she should do all this while building up sufficient resources for her own group, exercising good managerial skills, and preparing for sudden storms, since compliance issues can arise unexpectedly.

To a corporate board or CEO, elite credentials function as a proxy for the aforementioned skills. As associates within Big Law settings, elite compliance lawyers were forced to digest huge amounts of information in short periods of time. As line prosecutors and enforcement attorneys, they became experts in particular areas of the law and gained intimate knowledge of the various regulatory agencies overseeing the firm's business. As students in highly competitive law school settings, they bested their peers over a period of years, performing well on high-pressure tests.

To be sure, elite associates and government attorneys are far from the *only* lawyers who possess these traits. There may well exist a pool of lawyers (or, for that matter, nonlawyers) who possess these and *other* traits and who might be more valuable to the firm.[93] Nevertheless, if a board wishes to quickly "buy" an impressive compliance officer, the elite lawyer's credentials provide an extra layer of insurance. If all goes wrong, no one will blame the board for having hired a former Assistant U.S. Attorney who attended a "top ten" law school and served as a senior associate or junior partner at a "top fifty" law firm.

B. Securing Resources

Compliance work isn't just difficult; it is also expensive. Educating employees takes time, as does the integration of compliance procedures into the rest of the firm. Monitoring efforts require intelligent planning and

92. On the ways in which processes and structures impact compliance, see generally Veronica Root Martinez, *The Compliance Process*, 94 IND. L.J. 203 (2019). *See generally* Sharpe, *supra* note 9; Veronica Root Martinez, *Complex Compliance Investigations*, COLUM. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350463 [https://perma.cc/6DNB-D2SW].

93. For example, lawyers with significant seniority within the organization or lawyers who have a long and distinguished record of heading up compliance efforts at other companies may possess the same, or more valuable, qualities as a lawyer recruited from a Big Law firm or the upper echelons of the DOJ or SEC. For example, Ben Bard, who became CCO at Archer Daniels Midland (ADM) in the wake of a foreign bribery settlement, had prior experience managing Coca Cola's compliance and ethics department before taking on ADM's position. Jaclyn Jaeger, *Ben Bard: Crusader of Compliance*, COMPLIANCE WK. (Apr. 24, 2018), https://www.complianceweek.com/top-minds/ben-bard-crusader-of-compliance/2305.article [https://perma.cc/6VSS-9DC5].

sophisticated technology. Investigations and discipline are not only resource intensive but may also cause discomfort and hurt feelings if executed poorly.

One has to be deft in doling out punishment while simultaneously maintaining the loyalty of the target's peers. The individual who takes the reins of a corporation's compliance function must possess the ability to command resources and material support from the company's highest authority. The CCO can tout her organization as a "solutions provider" all she wants. She still needs management's support and the financial outlay necessary to monitor the workplace.

Accordingly, *within* the firm, it is reasonable to presume that elite CCOs can more easily command resources and respect than homegrown CCOs (those who came up the firm's ranks) or those with experience who nevertheless boast less impressive credentials. First, to the extent that board members and high-level officers consider themselves elite, they are likely to accord more respect to their peers.[94] Second, and perhaps more importantly, the elite CCO enjoys an important source of bargaining power: her ability to walk away if the board fails to invest in the compliance program's activities.

If the CCO is herself elite, she maintains the ability to walk away from the job precisely because her resume makes her attractive to competitor firms. Her future prospects are not tied up solely in the firm.[95] If corporate management rejects or ignores her requests for resources, the elite CCO can more easily find another job elsewhere. Indeed, she can do so rather noisily, attracting the attention of the press, activist investors, or government investigators. Aware of this dynamic, the company's highest level management will more likely accede to the CCO's demands for resources. To the extent the CCO's interests are aligned with that of the company's owners and the general public (i.e., that she is not just engaging in empire building), this ability to credibly threaten exit enhances the compliance function's size and power and thereby improves social welfare.

C. Signaling

The recruitment of an elite attorney to helm the firm's compliance organization emits potent internal and external signals. Within the firm, the CCO's arrival affirms to its rank-and-file employees that corporate management is committed to improving its compliance effort. That, in turn, improves morale among those inclined to follow the law and potentially induces broader and earlier internal whistleblowing. The company is able to detect and remediate wrongdoing sooner and more effectively because its

94. *See, e.g.*, Woodson, *supra* note 18, at 208.

95. By contrast, someone who has been with the firm for years may be more tied to the firm and unable to leave. For more on firm-specific investments in human capital and the ways in which those investments hinder employee exit, see Urska Velikonja, *The Cost of Securities Fraud*, 54 WM. & MARY L. REV. 1887, 1918–20 (2013) (observing that an employee who has built capital with the firm cannot easily switch jobs when she learns of the employer's fraud).

employees accept and internalize management's claim that it desires a compliant company.

By the same token, the elite CCO's hiring conveys important information to those situated outside the firm. An elite CCO, particularly one with a background in federal regulation or enforcement, improves the firm's reputation among regulators, corporate watchdogs, potential investors, and other groups. This reputational benefit instills a degree of trust in government regulators and prosecutors that might not otherwise exist. Trust, in turn, smooths the way for the government to exchange leniency for voluntary reporting.[96]

III. PERFORMANCE BLIND SPOTS

Part II laid out the benefits that accrue to firms when they hire elite attorneys to oversee their compliance functions. Elite actors improve compliance by contributing their knowledge and talents, by securing resources, and by authenticating the organization's bona fides to internal and external stakeholders.

This Part constructs a theory of "performance blind spots." Part III.A begins by exploring the already recognized relationship between performance and noncompliance. Part III.B hypothesizes why elite CCOs may be pathologically blind to the compliance risks posed by certain types of performance regimes.

A. Performance and Noncompliance

Why do people lie and cheat? Questions like these have long preoccupied behavioral ethicists, deterrence theorists, and criminologists.[97] Some individuals opportunistically prey on others, luring unsuspecting victims into fraudulent schemes and absconding with their money. In employment settings, the explanation for wrongdoing is often more nuanced. *Some* individuals may be opportunistic, but many others commit wrongdoing because they feel pressured by their respective organizations to meet certain performance targets.[98] In other words, they break laws not because they

96. *See* Baer, *supra* note 72, at 326 (explaining how trust facilitates the exchange of voluntary disclosure for prosecutorial leniency).

97. For the seminal application of rational choice theory to criminal law, see generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (offering the first modern formal model articulating economic theory premised on a cost-benefit analysis) and A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1 (1999) (refining earlier deterrence models by examining the declining disutility of punishment, as well as an individual's tendency to discount disutility in future time periods). *See also* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195–98 (1985) (constructing the "market bypass" theory, whereby offenders violate the law in order to evade the discipline of markets).

98. *See* Sally S. Simpson & Nicole Leeper Piquero, *Low Self-Control, Organizational Theory, and Corporate Crime*, 36 LAW & SOC'Y REV. 509, 510 (2002) (citing "firms that set unreasonable goals and then punish managers who fail create [sic] a climate of pressure and fear among employees, leading to 'innovative' solutions when objectives are not met").

enjoy doing so but because they feel they have no other choice.[99] When the probability of detection appears low and the costs of missing performance targets appear high, employees will break rules, and sometimes laws.[100]

To put it another way: most employees might *prefer* to meet a firm's performance targets authentically, through their own effort and ingenuity. When authentic performance appears impossible, however, some employees will resort to rule breaking and, eventually, lawbreaking. And once they resort to lawbreaking, these employees will find it very difficult to stop what they are doing because cessation of fraudulent activities often accelerates the detection of *previous* fraudulent activity.[101] Moreover, once *some* employees decide to substitute rule breaking for authentic performance, *other* employees may come to the conclusion that they too have no choice but to break various rules, just to keep up with their peers.

By definition, all performance regimes create *some* residual risk of lawbreaking. Any professor who has administered a final exam or graded a set of term papers understands this dynamic; many students do their own work, but a few will cheat or otherwise violate academic rules. For that reason, schools deploy a number of tools to deter and identify academic dishonesty such as plagiarism.[102] Schools employ exam proctors, encourage professors to utilize plagiarism-detection software, and implement honor codes among student bodies.[103] Moreover, they advise in student handbooks of the severe consequences of engaging in academic dishonesty and devise complex procedures for addressing claims of dishonesty and meting out discipline.[104]

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99. Armour et al., *supra* note 29, at 18–19 (explaining how performance metrics can drive risky or noncompliance behavior among employees who feel pressured to meet the company's goals). For a recitation of rationalizations employees use to justify their illegal behavior, see generally Todd Haugh, *Sentencing the Why of White-Collar Crime*, 82 FORDHAM L. REV. 3143 (2014). *See also* EUGENE SOLTES, WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL 6–7 (2016) (concluding that white-collar offenders engage in crimes because they are too distanced from the abstract and "amorphous" harms they impose on others through their financial manipulations).

100. *See* Velikonja, *supra* note 95, at 1919–20.

101. *See generally* Miriam Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295 (2008) (explaining the "linkage" between initial instances of fraud and continued fraudulent behavior); Velikonja, *supra* note 95, at 1924 (affirming that "fraud begets more fraud").

102. "As a student, plagiarism is a cardinal offense, punishable by expulsion under even the barest student honor codes." Andrew M. Carter, *The Case for Plagiarism*, 9 U.C. IRVINE L. REV. 531, 534 (2019) (citing penalties for law students).

103. *See* Lori A. Roberts & Monica M. Todd, *Let's Be Honest About Law School Cheating: A Low-Tech Solution for a High-Tech Problem*, 52 AKRON L. REV. 1155, 1156–57 (2018) (describing efforts of "professors and educational administrators scrambling to keep up with the tech-savvy world of academic dishonesty" in law school settings and combat academic dishonesty with the assistance of technology). For a comprehensive analysis of academic dishonesty in undergraduate settings as well as the approaches most likely to succeed, see DONALD L. MCCABE, KENNETH D. BUTTERFIELD & LINDA K. TREVINO, CHEATING IN COLLEGE: WHY STUDENTS DO IT AND WHAT EDUCATORS CAN DO ABOUT IT (2012).

104. For an early discussion advocating the procedures institutions of higher learning should adopt, see generally Curtis Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Processes for the University Student*, 99 COLUM. L. REV. 289 (1999).

Workplaces are, in some respects, analogous to academic settings.[105] Much like a university requiring a minimum grade point average, supervisors and managers communicate performance targets to their employees, and these targets, in turn, form the basis for remuneration and promotion. For simplicity, I refer to these goal-setting systems as "performance regimes." In a meritocracy, performance regimes serve as an objective basis by which to sort and distribute benefits to employees.[106] When performance is both authentic and properly evaluated, a performance-based metric improves social welfare by allocating resources efficiently within the firm and doing so in a way that participants are likely to respect as legitimate.[107] We would much prefer a firm to dole out benefits and rewards according to performance as opposed to some other basis, such as race, gender, or social status.[108]

All performance regimes present some risk of cheating, however, and this in turn undermines their efficacy and legitimacy. Managerial researchers refer to this as the "goals gone wild" problem.[109] *Some* metrics pose more risks of cheating than others. In a private sector firm, the compliance officer ought to be attuned to these risks.

For example, *unrealistic targets* are problematic in that they set employees up to fail. If authentic performance is impossible or extremely difficult to achieve, employees will search for substitutes—including illegal behavior—and they will rationalize this behavior as "necessary" or "deserved" because the firm has saddled them with the obligation to achieve such unrealistic targets.[110]

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105. On the ways in which corporate compliance might learn from academic dishonesty research, see Maurice Stucke, *In Search of Effective Ethics & Compliance Programs*, 39 J. CORP. L. 769, 819–20 (2014) (describing different approaches to detecting cheating in the law school context and how that might inform corporate compliance efforts).

106. Admittedly, some may view the "concept of merit" as mostly myth. *See, e.g.*, Hilary Sommerlad, *The "Social Magic" of Merit: Diversity, Equity, and Inclusion in the English and Welsh Legal Profession*, 83 FORDHAM L. REV. 2325, 2326 (2015).

107. This claim admittedly oversimplifies the vast literature on incentives within firms. For example, because of a dynamic often described as the "motivational crowding-out effect," even relatively plausible rules can induce antisocial behavior in that they cause a decision maker to view the decision through a cost-benefit frame, and not through an ethical one. For an excellent overview of the literature describing this effect, see Kristen Underhill, *Money That Costs Too Much: Regulatory Financial Incentives*, 94 IND. L.J. 1109, 1121–23 (2019).

108. The firm could instead compensate its employees primarily on the basis of the employee's seniority within the firm. Although these metrics are more common in the public sector, scholars have suggested them in lieu of incentive schemes. *See* Lynn A. Stout, *Killing Conscience: The Unintended Behavioral Consequences of "Pay for Performance,"* 39 J. CORP. L. 525, 536 (2014) (questioning the "wisdom" of ex ante performance incentives).

109. *See* Lisa D. Ordóñez et al., *Goals Gone Wild: The Systematic Side Effects of Overprescribing Goal Setting*, 23 ACAD. MGMT. PERSP. 6, 7 (2009). *But see* Edwin A. Locke & Gary P. Latham, *Has Goal Setting Gone Wild, or Have Its Attackers Abandoned Good Scholarship?*, 23 ACAD. MGMT. PERSP. 17, 17 (2009) (dismissing the article as based primarily on anecdote and poor causal reasoning).

110. On rationalizations generally, see Todd Haugh, *Harmonizing Governance, Risk Management, and Compliance Through the Paradigm of Behavioral Ethics Risk*, 21 U. PA. J. BUS. L. 873, 892 (2019). *See also* Adam Barsky, *Investigating the Effects of Moral Disengagement and Participation on Unethical Work Behavior*, 104 J. BUS. ETHICS 59, 60 (2011) (describing research explicating an employee's "selective activation or disengagement

Many of the behaviors that feature heavily in familiar stories of corporate wrongdoing can be traced to unrealistic and unforgiving performance regimes. To meet ambitious cost-savings mandates, employees cut corners, including those related to safety;[111] they exaggerate sales at the end of a reporting period in order to meet overly aggressive targets;[112] and they bribe government officials (domestic or foreign) to meet quick production schedules.[113] To be sure, employees might engage in this conduct *anyway* to get ahead of their peers. The presence and framing of the firm's performance expectations, however, can drastically increase the risk of the frequency and severity with which misconduct occurs.

Performance regimes can also induce distortive behavior when they rely on *arbitrary cutoffs*. Well-documented distortions in financial reporting demonstrate the difficulties that inhere when employees are judged and paid not just on the basis of their qualitative performance but instead primarily on quantitative factors that incorporate relatively arbitrary temporal or geographic cutoffs.[114] When employee treatment is "sensitive" to quantitative targets, employees will "manage" their numbers in order to meet their targets.[115] That is, they will distort their underlying activity and distort

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of self-sanctions" in regard to unethical conduct); Tenbrunsel & Messick, *supra* note 23, at 227–28.

111. David M. Uhlmann, *After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413, 1420–28 (2011) (describing the Deepwater Horizon explosion and factors that produced it); *see also* GARRETT, *supra* note 58, at 117–21 (analyzing BP's safety lapses at its Texas City refinery, which led to an explosion and multiple deaths and injuries in 2005).

112. The Wells Fargo scandal of a few years ago falls within this category, as did Sears's auto center scandals of the early 1990s. In both instances, pressure on employees to drive company profits led to fraudulent practices. *See* June Carbone, Naomi Cahn & Nancy Levit, *Women, Rule-Breaking, and the Triple Bind*, 87 GEO. WASH. L. REV. 1105, 1151 (2019) (discussing pressure on employees to engage in fraudulent practices such as opening new accounts without the customer's knowledge or consent); W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905, 908 (2019) ("Wells Fargo did not require its employees to break federal banking law, but it did make it virtually impossible for them to keep their jobs unless they did."); *see also* Lynne L. Dallas, *Preliminary Inquiry into the Responsibility of the Corporation and Their Officers*, 35 RUTGERS L. REV. 1, 39–40 (2003) (describing the ill effects of "placing unrealistic expectations on employees and threatening them with dire personal consequences for not meeting certain ends").

113. *See, e.g.*, Sharpe, *supra* note 9, at 1330 (describing evidence of Walmart's Mexican subsidiary's illegal payments to Mexican authorities, which reportedly were intended to allow it to build more stores and "expand more quickly" throughout Mexico); Press Release, U.S. Sec. & Exch. Comm'n, Medical Manufacturer Settles Accounting Fraud Charges (Sept. 28, 2017), https://www.sec.gov/news/press-release/2017-178 [https://perma.cc/6K7W-EZTE] (describing a Massachusetts-based medical company's accounting fraud and improper payments to foreign officials in order to drive sales and meet revenue targets).

114. "[I]ncentive pay has been statistically linked with opportunistic, unethical, and even illegal executive behavior, including earning manipulations, accounting frauds, and excessive risk-taking." Stout, *supra* note 108, at 534.

115. The inverse is also true. *See* Dain C. Donelson & Christopher G. Yust, *Litigation Risk and Agency Costs: Evidence from Nevada Corporate Law*, 57 J.L. & ECON. 747, 771 (2014) ("If managers are able to otherwise extract value from the corporation without needing to meet earnings targets, reporting positive earnings performance becomes relatively less important, so it is not surprising that earnings management would decrease.").

the manner by which they report such activity through the firm's reporting channels.[116] Moreover, if judged solely on the performance of their own divisions, divisional and regional managers will always seek to optimize the performance of their own units, even if those decisions threaten long-term harm to the firm.[117] These distortions represent a deadweight loss to the firm; they waste the employee's time, mislead her managers, and increase the threat that a relatively minor distortion today will eventually snowball into material fraud tomorrow.[118]

Finally, employers who build *too much variance* into their measurement regimes—that is, by creating a major difference in how employees are treated depending on whether they meet, exceed, or just miss a given target—further risk illegal behavior. Employees who fall just short of a profitability target and who know that falling short will be met with a demotion, a reduction in salary, or termination will be far more incentivized to engage in misconduct than employees who face far less severe consequences.

B. Strategies for Mitigating Performance-Related Misconduct

One takeaway from the foregoing discussion might be to relax performance requirements or judge employees according to more prosocial metrics, such as their seniority and experience, their degree of effort, and their ability and willingness to collaborate.[119] Whatever the merits of this approach, it seems unlikely to displace more quantitative factors, at least within the private sector. "Goals gone wild" may be a problem, but few would seriously propose the firm's elimination of *all* quantitative or objective goals.

Ideally, an effective compliance program would aid the firm in mitigating and avoiding the worst consequences of performance regimes. Readers will note that this requires a mix of ex ante and ex post protections. Ex ante, a firm's CCO should guide supervisors away from unrealistic targets, arbitrary cutoffs, and overly draconian regimes that tolerate disproportionate variance between different degrees of performance. If management pushes back, a CCO who recognizes the risks inherent in certain performance regimes can also build in additional oversight structures to reduce misconduct risk. For example, if the CCO is aware that a division within the firm has implemented a particularly unforgiving performance requirement, the CCO can direct additional monitoring resources to that division to ensure reported outcomes

116. "[G]oals and quotas—commonplace in many phases of a business—can distort judgment especially when the goal is close but still out of reach." Donald C. Langevoort, *Behavioral Ethics, Behavioral Compliance*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING, *supra* note 72, at 267.

117. "A divisional manager typically seeks to maximize the reported profitability of her own business unit, not necessarily the value of her firm as a whole." Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 696 (2010).

118. *See generally* Velikonja, *supra* note 95.

119. *See, e.g.*, LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE (2011) (criticizing pay-for-performance regimes and arguing for a prosocial approach to corporate governance).

really are as positive and genuine as supervisors claim. Performance regimes may cause cheating, but the firm can protect itself by erecting heightened monitoring programs to deter and address such cheating.

Ex post, a firm's CCO and deputies must be adept at recognizing the red flags of inauthentic performance, or what one might call "too good to be true" performance.[120] When an employee's group or division manages to beat all targets, month after month, year after year, the firm must verify that rosy reports reflect legitimate performance and are not the product of illegal behavior. An effective CCO will coax higher-level managers and board members to review positive reports more critically, invest in more frequent and robust internal monitoring systems, take whistleblowing reports more seriously, and embrace additional tools adept at detecting violations of law.

Finally, the CCO must ensure that a proper system of monitoring, discipline, and internal norms exist sufficient to: (a) deter employees from violating policies and laws and (b) induce law-abiding employee-witnesses to report violations to the firm's internal compliance authorities. The system will likely rely on a mix of formal rules and sanctions, as well as informal cultural and organizational influences.

Thus, the typical CCO must skillfully engage in several tasks at the same time. She needs to flag performance regimes that introduce too much risk; protect certain regimes with additional oversight mechanisms; examine with a skeptical eye actual performance that is potentially the result of bad behavior; and put in place the formal and informal mechanisms that keep the residual risk of wrongdoing to a minimum. And finally, our intrepid CCO must also implement and update mechanisms designed to test the efficacy of the tools and systems she has embraced to carry out these tasks.

Were one to summarize the foregoing strategies, one might rank them in terms of preference. For example, Table 1 might express many readers' intuitions in that it assumes that it is best to avoid overly risky performance regimes in the first place.

Table 1: Three Strategies for Reducing Performance-Related Misconduct

First Best Option	Second Best Option	Third Best Option
Dismantle overly risky performance regimes.	Protect riskier regimes with greater monitoring and oversight.	Identify and discipline "too good to be true" performance.

Table 1 also illuminates several practical underpinnings of the long-standing debate over "deterrence" and "integrity" approaches to compliance. A program that focuses more on the second and third strategies (oversight and discipline) by definition looks far more like the kinds of programs that

120. Langevoort, *supra* note 116, at 268 ("[W]hen we observe some person or team hitting 'stretch' goals period after period, it should be a compliance red flag, not just the cause for celebration and reward payouts that it is in so many firms.").

rely on conventional deterrence mechanisms. A program that seeks to dismantle overly draconian performance regimes and implement programs less sensitive to quantitative performance will often be deemed the more "values oriented" approach.

The foregoing labels, however, oversimplify the challenge of reducing wrongdoing within the firm. A firm that unilaterally disables its objective performance metrics risks losing its access to capital as well as its human talent. Moreover, a CCO who joins a firm that is a going concern must also take into account the costs—to the firm, and to her own department's mission—of dismantling the policies and structures that precede her. Accordingly, the pragmatic CCO will likely choose a mix of the three strategies, relying in part on past practice, interpersonal dynamics, and the extent to which a given performance regime appears particularly risk-laden compared to others.

C. Constructing a Theory of Performance Blind Spots

Scholars have already cited a wealth of structural and behavioral factors that undermine the CCO's efforts to implement an effective compliance program. As noted earlier, Bazerman and Tenbrunsel's work explains that ethics programs underperform because individuals often fail to recognize the unethicality of their own behavior.[121] Corporate governance scholars, by contrast, focus on incentive mismatches. John Armour, Jeffrey Gordon, and Geeyoung Min have demonstrated ways in which stock-based compensation induces corporate managers to overvalue short-term profits and shortchange longer-term investments in compliance.[122] Donald C. Langevoort and others have shown how cognitive errors and biases undermine the robust monitoring envisioned by regulators and prosecutors.[123] Legal ethicists, in turn, focus even more attention on attorney-specific biases and heuristics, such as loyalty and conformity.[124]

These critiques omit an additional variable: the background of the individual occupying the CCO's position. It may matter *who* occupies that position, and it may further be the case that an elite background undermines her ability to recognize the problems with the performance regimes outlined in Part III.B. To that end, the elite CCO behaves very much like the person

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121. BAZERMAN & TENBRUNSEL, *supra* note 23, at 126 ("Although organizational efforts to create systems that improve members' ethical behavior are often well intentioned, psychological processes limit the effectiveness of such solutions."). Indeed, "sanctioning systems" can, in some circumstances, induce *more* wrongdoing because they increase the probability "that the behavior will be evaluated [by employees] via a cost-benefit analysis rather than on its ethicality." *Id.* at 127.

122. Armour et al., *supra* note 29, at 5.

123. *See generally* Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71.

124. For an early and major discussion on this topic, see Kim, *supra* note 22, at 998–99, 1019–24 (describing loyalty and conformity pressures that lead inside corporate counsel to deliver suboptimal gatekeeping). *See also* Paula Schaefer, *Behavioral Legal Ethics Lessons for Corporate Counsel*, 69 CASE W. RES. L. REV. 975, 984–1000 (2019) (describing biases and heuristics that affect corporate attorneys in their representation of corporate clients).

who fails to perceive her ethical weaknesses.[125] The issue is not that the CCO lacks a moral valence or holds the wrong values. Rather, it is that she is bounded in her ability to recognize what is and is not a dangerous performance regime. And the reason she is bounded in this recognition is that she herself has bested many performance regimes over the course of her career.

Readers will recall from Part II that there exist many good reasons to embrace an elite CCO, particularly one who hails from outside the firm. The same qualities that make the elite CCO an excellent hire, however, may also set her up for failure. The elite CCO is, *by definition*, a top performer. To rise to that level, she has bested a series of performance challenges on multiple occasions. Moreover, she is also likely an outsider. After all, the firm that wishes to signal that it is turning over a new leaf, will seek not only a "legal elite" but also someone who bears no taint from the previous scandal. As a result, the firm will forgo the opportunity to promote someone (perhaps with a less elite background) from within. The elite CCO's outsider status carries reputational value, but it simultaneously aggravates the CCO's blind spots.

Imagine a brand new CCO confronts a series of performance targets upon entering the firm. Which ones merit the closest attention, and which ones deserve to be shelved immediately? If the firm is emerging from a scandal, the worst systems may be obvious to everyone. Beyond this, however, reasonable people will differ. It will be the CCO's responsibility to tread carefully but thoroughly in determining which *additional* performance goals merit a closer look, and it may not be the goal itself that is the problem. It may be how the firm measures the goal, how it compensates (or punishes) performance aimed at achieving said goal, or how quickly it expects its employees to meet its goal that induce different degrees of misconduct.[126]

It is within this ambiguous gray zone that performance blind spots are most likely to emerge and do their damage. Absent blunt evidence to the contrary, someone who has repeatedly scored in the top percentiles nationally on standardized tests; who has then followed up that performance by scoring at the top of a law school's grading curve; and who has bested many of her competitors in series of workplace mini tournaments might not find a series of severe or unforgiving performance targets problematic. By the same token, someone who has routinely lived with arbitrary cutoffs (such as the cutoffs state bar associations routinely put in place for test takers) or high-

125. When an individual is unaware of her ethical failings, we say that she suffers "bounded ethicality." Due to psychological processes (including rationalizations for the underlying behavior) the person deludes herself in such a way that she remains unaware that she is behaving unethically and therefore sees no inconsistency between her conduct and her desire to behave like a morally upright person. *See* FELDMAN, *supra* note 24, at 50–53 (describing research).

126. Armour et al., *supra* note 29, at 18 (explaining that "the compliance implications of performance targets are a joint function of the definition of the targets themselves and the intensity of the financial incentives—in terms of rewards (penalties) for meeting (missing) targets").

variance tests (evidenced by exams such as the LSAT and SAT) may not be as quick to look skeptically on regimes that promise high-variance consequences for employees who fall just short of a predefined goal. And finally, someone who has authentically performed at the top of her game—for quite some time—might not be as skeptical of a high-level manager's performance that, in other contexts, might be adjudged "too good to be true."

Now, one might argue in response that the academic context could just as easily train academic high achievers to become superior monitors insofar as they have witnessed dishonesty caused by the academic version of "goals gone wild." After all, we know cheating occurs frequently throughout institutions of higher learning.[127] Perhaps elite lawyers have learned and benefited from witnessing such episodes? Just as an Olympian knows some of her competitors use illegal performance-enhancing drugs, so too might a compliance elite realize that some of her competitors have violated academic rules. Knowledge of cheating throughout academia ought to improve the elite compliance officer's oversight throughout workplace settings.

The foregoing assumes, however, that academic institutions are transparent about their students' bouts with dishonesty. Most academics would conclude the opposite. For a mix of reasons, institutions of higher learning tend to favor opacity in their responses to academic dishonesty. Cheating scandals imply both that the students are less able than advertised *and* that the universities lack adequate internal controls. Reputational costs, student privacy concerns, and the desire to head off expensive litigation collectively encourage a culture of silence among academic administrators. Professors may be aware of cases of plagiarism that they themselves have cited, but their institutions will almost certainly channel those cases to academic discipline committees, whose processes and determinations are purposely kept obscure and divorced from scrutiny.[128]

Only when instances of cheating become so severe that they blow up into pressworthy scandals will they finally penetrate the public psyche.[129] And in those circumstances, the specific facts will lead the institutions in question to minimize the conduct as rogue behavior, unrepresentative of the rest of the institution (or motivate rival institutions to insist that the cheating is limited to just a single competitor). Accordingly, unless a high-performing student is personally aware of academic dishonesty (because, for example, she directly witnessed it), she is likely to underestimate the extent to which harsh or high-stakes grading schemes fuel antisocial behavior. To the contrary, she

127. *See, e.g.*, Angela D. Miller, Tamera B. Murdock & Morgan M. Grotewiel, *Addressing Academic Dishonesty Among the Highest Achievers*, 56 THEORY INTO PRACTICE 121 (2017).

128. Alan Hamlin et al., *A Comparison of University Efforts to Contain Academic Dishonesty*, 16 J. LEGAL ETHICAL & REG. ISSUES 35, 45 (2013) (concluding that universities apply their policies inconsistently and "do not share information on offenses and offenders" that can be easily retrieved, compared, or analyzed).

129. *See, e.g.*, Marc Tracy, *College Sports 101: A U.N.C. Class Reviews a Scandal at Its Source*, N.Y. TIMES (Apr. 4, 2019), https://www.nytimes.com/2019/04/04/sports/unc-scandal.html [https://perma.cc/X4CL-77] (describing the 2014 discovery that UNC Chapel Hill had offered hundreds of athletes credit for "fraudulent classes" that either required very little or no work at all).

may simply assume that tough grading schemes bring out the best in all of us and allocate rewards in a rational, welfare-increasing manner.

Accordingly, for the elite CCO, her prior performance functions as a kind of cognitive blind spot. Her long history of successfully navigating high-stakes tests fails to alert her to the risk of misconduct inherent in certain types of goal-setting behavior. As a result, she fails to identify risky compensation policies or argue forcefully enough for their alteration. She fails to recognize the need for additional oversight and monitoring for the programs that remain in place. And she is less skeptical of too-good-to-be-true performance, particularly among employees and divisions that have already been designated "hot shots" by their peers. To be sure, much of this likely happens at the margin. Given enough information, a CCO can and may eventually overcome her blind spot. But the delay in recognizing a problem is often key to preventing it, or at least preventing it early enough from becoming a catastrophe.

D. Objections

The hypothesis I have laid out is just that. One would need empirical research to support the claims I make in the preceding sections. Apart from a lack of empirical data, one might further object that the model fails to take into account those studies that have found that cognitive mistakes affect lawyers and clients differently.[130] By the same token, we also know that we often judge our *own* performance differently from the performance of others. Thus, the positive light we attach to our own motivations or actions ought to disappear when we judge someone else's motivations or actions.[131]

But performance differs in important ways from motivation. The argument here is that the elite CCO will judge the firm's performance targets with rose-colored lenses because *she* encountered hurdles long ago over which *she* triumphed with hard work and ingenuity. Thus, she will discount the likelihood that undeserving colleagues will fall short, view the regimes as unfair, or most importantly, gravitate towards distortive and illegal conduct. It is not the colleagues' motivations that she will misjudge; rather, she will misjudge the *regimes* under which they have been expected to perform because she once bested regimes of similar severity.[132]

Having approved or acquiesced in these performance regimes, the CCO subsequently will be less inclined to question "good performance" because questioning someone's good performance would be tantamount to questioning an earlier determination that a given goal or set of goals was

130. *See generally* Jennifer Arlen & Stephan Tontrup, *Does the Endowment Effect Justify Legal Intervention?: The Debiasing Effect of Legal Institutions*, 44 J. LEGAL STUD. 143 (2015) (reporting the results of an experiment where the principal-agent relationship effectively reduced the endowment effect).

131. For more on this "holier than thou" viewpoint, see Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1185–86 (2010).

132. *See* FELDMAN, *supra* note 24, at 39 ("[P]eople do not just react to their current situation; much of their behavior is related to experiences in previous situations.").

reasonable. Moreover, it would cast the CCO's personal, historical narrative in an uncomfortable light. She herself would no longer be the beneficiary of a "tough but fair" testing regime (or in reality, series of regimes). Instead, she would be the winner of a high-stakes game that was known to generate cheaters and market distortions among her peers.

Thus, the performance blind spot emanates from how the elite CCO conceptualizes her own success. She fails to recognize the weaknesses in a hypermotivated performance regime because to do so would be to question the very types of regimes that eased her ascendance into an ever-narrowing pool of elites. Viewed from that lens, the performance blind spot is a coping mechanism, and it should sound familiar to those who study cognitive dissonance and self-serving biases.[133] To avoid the discomfort that arises when inconvenient facts challenge one's embedded belief systems, one ignores or reshapes the evidence at hand.[134]

Motivated reasoning[135] can be dangerous in any setting, but for the elite CCO navigating a complex and sophisticated corporation, it is doubly problematic. *First*, the CCO underestimates the misconduct risk inherent in a series of performance regimes. *Then*, the CCO ignores red flags relating to one or more units' miraculous performance. *Eventually*, distortive conduct coalesces into a scheme that inexorably collapses under its own weight.

IV. IMPLICATIONS FOR THE COMPLIANCE-SEEKING FIRM

As Part III explains, the performance blind spot is a problem of perception. It extends not simply to one's behavior but to the performance and goal-setting systems one has been asked to evaluate. Historical success in one domain instigates blindness in another. To the elite CCO, systems that routinely assess, reward, and punish the company's employees will seem more innocuous, more virtuous, and more accurate than they should, precisely because the elite CCO flourished under similar regimes.

Performance blind spots represent an important theoretical contribution to the study of corporate compliance. First, they focus greater attention on the compliance function's chief officer, as well as her background. Second, they demonstrate the incompleteness of the structural debate that currently preoccupies corporate compliance scholars. The issue is not simply one of integrating or separating the firm's compliance function from its legal department. Firms will seek "elite" compliance officers regardless of

133. *See id.* (explaining that self-serving biases "are usually interpreted as aligning reality with people's self-interest"); Donald C. Langevoort, *Where Were the Lawyers?: A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 102–03 (1993) (explaining the cognitive processes that lead someone to reject information that conflicts with previously held attitudes or beliefs).

134. Robert A. Prentice, *The SEC and MDP: Implications of the Self-Serving Bias for Independent Auditing*, 61 OHIO ST. L.J. 1597, 1617 (2000) (explaining cognitive dissonance as "the tendency of people to reduce or avoid psychological inconsistencies").

135. On motivated reasoning, see David Yokum, Christopher T. Robertson & Matt Palmer, *The Inability to Self-Diagnose Bias*, 96 DENV. L. REV. 869, 901 (2019) ("Substantial research indicates that people are motivated to perceive themselves in a positive light.").

whether they choose a standalone compliance department or one integrated with the rest of the firm. And if an elite CCO suffers performance blind spots, it is difficult to imagine how those blind spots will fall away if she happens to direct a standalone function or one nested within the company's legal department. Either way, the blind spots will impair her ability to identify risky performance regimes.

What, then, is the answer to this problem, assuming we agree it is a problem? The answer is *not* that boards and managers should cease the hiring of elite lawyers into jobs that require a keen understanding of the psychology of dishonesty. Not only is this prescription implausible but it would be highly counterproductive. As Part II established, elite lawyers enjoy many desirable qualities, not the least of which is their talent and deep expertise. Although corporate boards may overvalue elite credentials (particularly in comparison to other soft qualities), it is hardly irrational to treat stints in Big Law or federal enforcement agencies as useful proxies for high legal acumen and commitment to hard work.

Drawing on the cognitive bias literature, one might conclude that the best way to approach the problem is to address and mediate it. Although the so-called perfect remedy lies far beyond this project's scope, I touch on three possibilities below.

First, the debiasing literature might offer some help in disarming the CCO of her performance blind spots. When a decision maker's decisions are colored by biases and heuristics, legal regimes can respond either by insulating an organization from such "boundedly rational" decision-making, or "by operating directly on the boundedly rational behavior and attempting to help people either to reduce or to eliminate it."[136] The latter approach is of course the debiasing approach. One could imagine a series of presentations or even interactive exercises designed to debias the CCO of her belief that high-stakes performance regimes always bring out the best in their participants. Perhaps, when confronted with such evidence, the CCO would become more skeptical of performance regimes and more willing to question instances of superlative performance.

Debiasing strategies, however, have been met with limited success in other contexts, in part because relapse is common. Moreover, a debiasing strategy may be of less help in curing an actor of a given blind spot than other biases or heuristics.[137] If the *reason* an elite embraces a high-stakes performance regime is bound up with the CCO's personal narrative ("I was tested this way and I did just fine!"), then that elite may encounter difficulty backing away from this narrative, even when confronted with corrective information.

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136. Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 200 (2006). As Feldman points out, debiasing studies that rely on experimental settings may not translate so well into real-life situations, particularly where individuals prefer not "to be made aware of the implications of their behavior." FELDMAN, *supra* note 24, at 92 (describing the drawbacks of debiasing strategies).

137. *See generally* Daniel Pi, Francesco Parisi & Barbara Luppi, *Biasing, Debiasing, and the Law*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 143 (Eyal Zamir & Doron Teichman eds., 2014).

That brings us to a second option, namely the use of artificial intelligence tools to manage risk. Scholars have already begun to analyze the ways in which artificial intelligence is likely to alter compliance metrics,[138] corporate legal advice,[139] and the workplace itself.[140] Would a risk-evaluation tool enable the CCO to move past her performance blind spots? Perhaps, but insofar as the tool would require analysis on the front and back ends, it is impossible to say that machine learning will protect the company from its employees' cognitive failures. So long as (human) elites continue to play major decision-making roles in firms, so too will their biases and heuristics. Thus, although we might welcome an artificial intelligence tool designed to catch overly risky performance metrics, we ought not to rely too heavily on it, as it is bound to fail so long as humans play a role in administering it.

That brings us to the third option, the seniority approach, which is the most simplistic of the three but also the one most easily implemented: corporate boards and elite CCOs should pay close attention to lower-level compliance personnel who have been employees for a comparatively long time. That is, they should be sure not to undervalue the lower-level compliance officer's seniority and tenure. Those who have been with the company for a long time may be tainted by recent scandals and demoralized by previous supervisors. Their resumes may be less objectively impressive than that of the elite CCO. They will, however, have a better sense of how various incentive schemes have affected the workplace. That is, their experience may help the elite CCO overcome her performance blind spots.

Thus, the performance blind spot may explain why it is that corporate boards and corporate CCO's should value seniority among mid- and lower-level compliance managers. The elite CCO may bring needed respect to the compliance function, but it will be the compliance department's long-term members who best understand the threats embedded in the company's performance regimes.

CONCLUSION

This piece opened by citing a notable compliance failure that produced the subsequent hiring of an elite CCO. The elite CCO exists in certain quarters and will continue to exist so long as compliance remains a priority for regulators, prosecutors, and corporate management. Boards rightfully purchase elite credentials for their internal and external signaling powers. A robust network of law firms, enforcement agencies, and consulting companies are just as intently developing the skill sets of a new crop of would-be CCOs. These attorneys are poised to take the reins of numerous

138. Laufer, *supra* note 42, at 418–20.

139. *See generally* Milan Markovic, *Rise of the Robot Lawyers?*, 61 ARIZ. L. REV. 325 (2019).

140. Firms may prefer to replace individuals with machines insofar as machines are less prone to driving up the firm's compliance costs. *See* Cynthia Estlund, *What Should We Do After Work?: Automation and Employment Law*, 128 YALE L.J. 254, 291 (2018) (observing that firms can tamp down compliance-related costs by replacing employees with automation).

companies' compliance functions and fashion them into highly effective programs. Some will succeed in this endeavor. Others may not be so fortunate. Indeed, if the elite CCOs who are emerging today fail to recognize and confront their unique biases, they may finally experience something that they have been fortunate enough to avoid for most of their lives: failure.